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# **In the Supreme Court of the United States**

OCTOBER TERM, 1947

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No. 657

UNITED STATES OF AMERICA, EX REL. FREDERICK HEINRICH  
WEDDEKE, PETITIONER

*v.*

W. FRANK WATKINS, AS DISTRICT DIRECTOR OF IMMIGRATION  
AND NATURALIZATION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT*

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## **BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### **OPINION BELOW**

The opinion of the circuit court of appeals (R. 27-36) is not yet reported.

### **JURISDICTION**

The judgment of the circuit court of appeals was entered February 4, 1948 (R. 37). The petition for a writ of certiorari was filed March 8, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether the immigration authorities acted arbitrarily in finding that petitioner, an admittedly deportable alien, failed to establish good moral character during the five years preceding the institution of deportation proceedings, such proof being a necessary condition of favorable exercise of their power to suspend deportation in economic hardship cases, where during such five-year period he had been convicted on his plea of guilty of incest with and rape upon his twelve-year-old daughter.

2. Whether the deportation proceedings were fair.

### STATUTE INVOLVED

8 U.S.C. 155 (c) provides in pertinent part:

In the case of any alien [with exceptions not material] who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . .

(2) suspend deportation of such alien if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien. . . .

### STATEMENT

Petitioner is a German alien who entered the United States as a stowaway in 1926; he is therefore, admittedly, subject to deportation under 8 U.S.C. 155(a), 213(a), and 214 (Pet. 2). The following facts are also undisputed: In June 1942, petitioner was convicted in a New York state court, on his plea of guilty, of acts of incest with and rape upon his then twelve-year-old daughter, the charges having been brought by his wife and corroborated by the daughter, and he was sentenced to imprisonment for five to ten years (R. 6). Upon his release from the penitentiary on parole

in September 1945, he was arrested under an immigration warrant charging him with being subject to deportation on the ground of having entered the country illegally (R. 18, 29). On December 5, 1946, he was accorded a hearing before an immigrant inspector, who, at the conclusion of the hearing, recommended that he be deported on the charge contained in the warrant of arrest (R. 7, 18). On April 15, 1947, the Commissioner of Immigration and Naturalization ordered him deported. On April 18, 1947, the Board of Immigration Appeals affirmed the Commissioner's order, and on the same day a warrant directing petitioner's deportation to Germany was issued. On October 13, 1947, petitioner's motion for a stay of deportation, which had been filed on an undisclosed date following issuance of the deportation warrant, was denied by the Commissioner. Petitioner is in the custody of respondent under the deportation warrant. (R. 19.)

On or about October 27, 1947, petitioner's attorney, whom he had retained, apparently, on or about October 24, 1947 (see R. 5, 12, 13), filed on behalf of petitioner in the District Court for the Southern District of New York a petition for a writ of habeas corpus challenging the legality of his detention (R. 5-11). The allegations of the petition were made on information and belief with the exception of one statement (see R. 9), which the attorney made of his own knowledge (R. 5). The petition alleged that petitioner's plea of guilty to the incest-rape charges was made without the advice of counsel and that he "did not expressly waive counsel, but in his consternation and confusion about the horrible charges brought against him by members of his family, upon the importunities of the District Attorney who advised him not to make any fuss, pleaded guilty. \* \* \* Said plea was made in confusion and despair and without understanding on the part of the relator of the nature of

the charges" (R. 6). The petition further alleged that, upon his release from the penitentiary, petitioner "was arrested by the Immigration and Naturalization Service for deportation, and after a hearing held \* \* \* on December 5, 1946, before Inspector Warren A. Mueller, he was ordered deported by a decision of the Board of Immigration Appeals, and he is held for deportation on or about October 30th, 1947. Suspension of deportation was denied him on the ground that his conviction as aforesaid is proof of his bad moral character. In view of relator's offer to prove his innocence of the crime of which he was charged, this finding is unjust and arbitrary" (R. 6-7).

The petition further alleged that the "hearing [of December 5, 1946] and the proceedings herein had in the deportation case" were "unfair, arbitrary, capricious and contrary to law" for the following reasons:<sup>1</sup> (1) Petitioner "never committed the crime of incest with his daughter, of which he had been charged."<sup>2</sup> \* \* \* Said charges of his wife and daughter were made unjustly and untruthfully, in order to get the relator out of the house. \* \* \* The relator has requested the Immigration Service to stay deportation so that he can either open the proceedings in the County Court, for Nassau County, New York, in which he was convicted, or make a pardon application to the Governor of the State of New York, which would wipe out his conviction. However, the Immigration Service refused to grant him the opportunity of doing so, stating as a reason for its refusal of doing so the severe nature of the

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<sup>1</sup> Among others which are evidently no longer relied upon (see (b) and (c), R. 8).

<sup>2</sup> Affidavits of petitioner's wife and daughter, both dated October 25, 1947, stating that their charges against him had been falsely preferred, were attached to the petition (R. 12-15).

crime" (R. 7-8);<sup>3</sup> (2) the immigrant inspector who conducted the hearing of December 5, 1946, "indicated to the Relator that it was not necessary to have counsel at the hearing and thereby induced the relator to proceed at the hearing \* \* \* without counsel" (R. 8);<sup>4</sup> (3) "At the said hearing of December 5th, the presiding Inspector of the Immigration Service, Mr. Mueller, stated in the record that the relator should read the report of a Probation Officer, which was marked Exhibit 5, and that relator should state whether the report was substantially true. Relator answered 'yes' meaning that he would read the report, but it was taken away by the inspector before he read it and relator was not given a chance to examine said report and he never read same, and the report is untrue. As the minutes of the hearing stands, it may be misconstrued as if relator confirmed the veracity of the Exhibit 5, while he only said that he was willing to read it. Relator had no previous opportunity of correcting this ambiguity, as he never had been given a copy, although he had demanded a copy of said record at the hearing of December 5, 1946" (R. 9); (4) "The undersigned attorney has not been given an opportunity of examining the record of the Immigration Service, although demand therefor has been made on October 24, 1947, except that a copy of the minutes of the hearing of December 5, 1946, of the findings of the presiding

<sup>3</sup> The petition did not state when the application for stay of deportation was made, but it clearly must have been made after April 18, 1947, when the warrant of deportation was issued. See 8 C.F.R., 1943 Cum. Supp., 150.12(e), providing for discretionary stays of deportation, after deportation has been ordered, where "some serious emergency arises, or where new and material evidence is discovered." The application was denied on October 13, 1947 (R. 19).

<sup>4</sup> It is provided in 8 C.F.R., 1943 Cum. Supp., 150.6(c), that "At the beginning of a hearing under a warrant of arrest, the presiding inspector shall \* \* \* (2) apprise the alien, if not represented by counsel, that he may be so represented if he desires and require him to state then and there for the record whether he desires counsel \* \* \*."

Inspector and of the decision of the Board of Immigration Appeals of October 13th [*sic*: April 18, 1947?], have been handed to the undersigned on October 24, 1947" (R. 9).

A writ of habeas corpus was issued on October 31, 1947 (R. 3-4), respondent filed a return (R. 16-19), and petitioner filed a traverse (R. 20-21).<sup>5</sup> On December 26, 1947, following argument on the pleadings, no testimony being adduced, the writ was dismissed and petitioner was remanded to respondent's custody (R. 22-23). On appeal to the Circuit Court of Appeals for the Second Circuit, the order of the district court was affirmed (R. 37).

#### ARGUMENT

1. Under 8 U.S.C. 155(c), *supra*, p. 2, the Attorney General is given discretionary power to suspend the deportation of a deportable alien "who has proved good moral character for the preceding five years" if the alien is not racially inadmissible or ineligible for naturalization and if his deportation would result in serious economic detriment to a legally resident spouse, parent, or minor child. Proof of good moral character within the five-year period is thus a condition of the exercise of the discretionary power conferred. Petitioner contends that the immigration authorities, to whom this discretionary power of the Attor-

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<sup>5</sup> The traverse was actually in the nature of an amendment of the petition. It alleged that the incest-rape indictment charged petitioner with three criminal acts committed in December 1941, January 1942, and May 1942; that two of the alleged acts were without evidentiary support; that only the daughter's uncorroborated charges supported the third act, petitioner's wife having stated to the prosecuting authorities that she never witnessed any criminal acts; and that since there was no basis for the majority of the counts, the court should not have accepted a plea of guilty.

ney General has been delegated,<sup>6</sup> acted arbitrarily and abused their discretion in accepting his conviction of incest-rape in 1942 as proof of his lack of good moral character during the five-year period, in consequence of which they declined to exercise favorably to him their discretionary power to suspend deportation (Pet. 7, 8, 22-26). The contention is, we submit, without merit.

We assume in the following discussion, as did the circuit court of appeals (R. 32), that since the Attorney General has set up a quasi-judicial procedure for the determination of issues bearing on the propriety of exercising his power to suspend deportation under 8 U.S.C. 155(c),<sup>7</sup> the alien is entitled to procedural due process in the conduct of such hearing, and that if the alien, though admittedly subject to

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<sup>6</sup> The Attorney General has delegated his authority to deport or suspend deportation to the Immigration and Naturalization Service (8 C. F. R., 1943 Cum. Supp., 90.1), reviewing power being lodged in the Board of Immigration Appeals (id., 1945 Supp., 90.3(a) (2)) and ultimately in the Attorney General himself (id., 1945 Supp., 90.12).

<sup>7</sup> An alien who is charged with being subject to deportation is accorded a hearing before an immigrant inspector known as the presiding inspector to determine whether he is subject to deportation as charged (8 C.F.R., 1943 Cum. Supp., 150.6(a), (b)). The presiding inspector is required to apprise the alien, *inter alia*, of his right to apply for suspension of deportation if found deportable (id., 150.6(c)). At any time during the hearing the alien may give notice that he wishes to apply for such suspension (id., 150.6(g)). At the conclusion of the hearing the presiding inspector prepares a memorandum setting forth a summary of the evidence, his proposed findings of fact and conclusions of law, and a proposed order respecting deportation (id., 150.7 (a), (c)). If the alien has applied for suspension of deportation, the presiding inspector includes in his memorandum a discussion of the evidence relating to the alien's eligibility for such relief and states in numbered paragraphs his proposed findings of fact and conclusions of law in respect of such eligibility (id., 150.7(b)). The alien or his counsel is allowed a reasonable time in which to file exceptions to the proposed findings, conclusions, and order (id., 150.7(e)). The alien may request reopening of the hearing in a written application stating the grounds therefor (id., 150.8(a)). The alien may apply for suspension of deportation after the hearing has been closed in conjunction with a request that the hearing be reopened; such application must be addressed to the Board of Immigration Appeals after the record has been submitted to the Board (id., 150.8(b), 90.9).

deportation, is ordered deported without being accorded such procedural due process, the warrant of deportation can be challenged on this ground in habeas corpus proceedings.<sup>8</sup>

It appears from the record that at some stage of the deportation proceedings—just when was not clearly indicated in the habeas corpus petition (see *supra*, p. 4)—petitioner applied for suspension of deportation on the ground of economic hardship to his wife and family, and that the application was denied because he failed to establish good moral character during the preceding five years. The adverse determination of this issue was based on the fact that petitioner had been convicted in 1942 of acts of incest-rape. Even assuming that petitioner offered to prove to the immigration authorities that he was innocent of these crimes of which he stood convicted on his plea of guilty,<sup>9</sup>

<sup>8</sup> Cf. *Kessler v. Strecker*, 307 U. S. 22, 34. It should be recalled, however, that petitioner does not question the fact of his deportability, but merely asserts that the discretionary power to suspend deportation was arbitrarily exercised. As the circuit court of appeals pointed out in this connection (R. 35), the pertinent language of 8 U.S.C. 155(c) is permissive in nature. It states that the Attorney General *may*, not that he must, suspend deportation under the circumstances named. Cf. *United States v. District Director of Immigration*, 120 F. 2d 762, 764-765 (C.C.A. 2); *United States v. Reimer*, 103 F. 2d 777, 778-779 (C.C.A. 2).

<sup>9</sup> As pointed out by the circuit court of appeals (R. 34), "It is not even clearly alleged [in the petition for a writ of habeas corpus] that [petitioner] offered at the administrative hearing to prove his innocence of the crime of which he had been convicted. The affidavits of the wife and daughter, annexed to the petition, attesting to Weddeke's innocence of the crime, were executed after the termination of the administrative proceeding and were, therefore, obviously not offered therein." The only statements in the habeas corpus petition from which it could be inferred that petitioner, allegedly, protested his innocence of these crimes to the immigration authorities are the statement that "In view of relator's offer to prove his innocence of the crime of which he was charged, this finding [of bad moral character] is unjust and arbitrary" (*supra*, p. 4) and the statement that he requested a stay of deportation (after the hearing was over and he had been ordered deported) in order to institute proceedings to "wipe out" his conviction, either by judicial proceedings in the court of conviction or by a pardon (*supra*, p. 4).

they were plainly justified in relying on the record judgment of conviction of a court of competent jurisdiction as proof of the facts attested by the conviction and in refusing to conduct what would in effect be a new trial of the charges. They may not have been bound to accept the conviction as conclusive proof of petitioner's guilt, as the court below indicated (R. 34), but they clearly did not act arbitrarily or capriciously in refusing to go behind it.

The petition for a writ of habeas corpus, it is true, alleged not only that petitioner was innocent of the crimes he was convicted of, but that his conviction was a nullity on constitutional grounds because he pleaded guilty without the advice of counsel, without expressly waiving the assistance of counsel, and in consequence of undue influence on the part of the prosecutor. But the petition did not allege—contrary to the definite implications of the petition for a writ of certiorari (Pet. 6-7, 8, 10, 17, 19, 24, 25), and as the circuit court of appeals pointed out (R. 34)—that petitioner offered to prove, at the hearing before the immigrant inspector prior to the issuance of the warrant of deportation, that his conviction was a nullity because he had been denied his constitutional rights. It was not even averred in the petition that the basis of petitioner's motion for a stay of deportation was the alleged nullity of his conviction on constitutional grounds. It was alleged that a stay of deportation was requested in order that petitioner might "open the proceedings" in the court of conviction or apply for a pardon, but not that the immigration authorities were ever apprised that he had hope of obtaining such judicial or executive relief on the ground that his conviction had been unconstitutionally procured. Even assuming, therefore, that it would have been an abuse of discretion on the part of the immigration authorities to have refused to go behind petitioner's conviction if he had challenged it before them as a constitutional nullity, the writ of habeas corpus

was properly dismissed without the taking of testimony because the petition for the writ did not allege that petitioner ever challenged his conviction on constitutional grounds at any stage of the deportation proceedings.

Nevertheless, with the circuit court of appeals (see R. 34-36), we shall assume, *arguendo*, that petitioner did attack his conviction in the deportation proceedings as a constitutional nullity, and that the habeas corpus petition so alleged. Even so, we submit, the writ was properly dismissed without the taking of testimony. We think the court below was clearly correct in saying that it would not have been arbitrary on the part of the immigration authorities to refuse to go behind the incest-rape conviction and to make an independent investigation both into the question of whether the conviction was unconstitutionally procured and whether, apart from that, petitioner was in fact innocent or guilty of the crimes charged. The immigrant inspector who conducts a deportation hearing is essentially an administrative official, though the hearing, it is true, does have quasi-judicial aspects.<sup>10</sup> Clearly, it seems to us, such an official is not equipped to conduct such a serious judicial function as that of inquiring into the grave constitutional questions which may be expected to arise in any proceeding in which the formal record judgment of a court of competent jurisdiction is collaterally attacked as a constitutional nullity. As was pointed out by the court below (R. 35-36), to hold that immigration authorities are under

<sup>10</sup> The presiding inspector who conducts the hearing rules on all objections to the introduction of evidence and on motions made during the hearing. He also conducts the interrogation of the alien and the government witnesses, cross-examines the alien's witnesses, and presents such evidence as is necessary to support the charges in the warrant of arrest. (8 C.F.R., 1943 Cum. Supp., 150.6(b).) In the discretion of the officer in charge of the district where the hearing is held, however, a second immigrant inspector, known as the "examining inspector," may be designated to prosecute the charges, in which event the functions of the presiding inspector are mainly judicial (*id.*, 150.6(n)).

a duty, when the constitutional validity of a judgment of conviction is challenged, to determine the truth of the allegations on which the collateral attack is based, would "greatly complicate administrative hearings in deportation cases; the presiding inspector and the Board of Immigration Appeals would have to inquire into what happened at the criminal trial and then decide what might be a difficult question of constitutional law, namely, whether what occurred at the trial amounted to a denial of constitutional rights and rendered the resulting judgment a nullity. That is certainly not a task lightly to be assumed by the Attorney General himself or to be imposed on the administrative officials in the Immigration Service."

We also think the court below was correct in holding (R. 36) that the immigration authorities did not abuse their discretion in denying petitioner's application for a stay of deportation after the warrant of deportation had been issued, in order to permit him to apply for a pardon or to institute some legal proceeding to set aside the judgment of conviction. As we indicated previously, there was no allegation in the habeas corpus petition that the motion for a stay of deportation was based on an alleged deprivation of constitutional rights which resulted in the conviction. Consequently, it cannot be assumed that the immigration authorities, in denying the motion, were cognizant of any such claim on petitioner's part. If, giving the allegations of the petition a liberal construction, it be assumed that petitioner did allege in his motion for a stay of deportation that he falsely pleaded guilty to crimes he did not commit, the immigration authorities clearly did not act arbitrarily in declining to grant the requested stay on petitioner's unsupported claim of innocence. It must be recalled that the incest-rape charges were brought by petitioner's own wife and daughter and that, so far as the record indicates, he spent some three years and three months in prison serving

his sentence without ever questioning the propriety and legality of his conviction. Nor is there any indication that his wife and daughter, who preferred the charges, ever took any steps to correct a wrong done by them. It is true that the wife and daughter now say that their charges were unfounded. But their statements to that effect, in addition to being obviously interested and bearing the hall-mark of recent contrivance, were made just two days before institution of the present habeas corpus proceeding—more than five years after they brought the charges, nearly a year after petitioner's hearing before the immigrant inspector, more than six months after petitioner was finally ordered deported, and in fact some weeks after his motion for a stay of deportation was denied. Obviously, therefore, they cannot be considered in appraising the reasonableness of the immigration authorities' refusal to stay deportation. The regulation authorizing stays of deportation states that they may be granted where, deportation being imminent, "some serious emergency arises, or where new and material evidence is discovered" (8 C.F.R., 1943 Cum. Supp., 150.12(e)). Petitioner's now-claimed innocence of the crimes he was convicted of was obviously not "new and material evidence." If he is in fact innocent, it is something that he, his wife, and his daughter have known about from the beginning. We submit, therefore, that even assuming that petitioner averred in his application for a stay of deportation that he falsely pleaded guilty to crimes he never committed, the immigration authorities were well within the limits of sound discretion in declining to stay petitioner's deportation, since such an averment was manifestly one which, if true, could and should have been made much earlier.

2. Petitioner also contends that the deportation proceedings were unfair for the reasons that he was induced by

the presiding inspector at the hearing of December 5, 1946, to waive counsel, that the minutes of the hearing were falsified, and that his (subsequently-retained) counsel was refused permission to examine "the files" of the Immigration and Naturalization Service (Pet. 20-22). This contention, it is submitted, is also without merit.

(a) The contention in respect of having been induced to waive counsel has reference to the allegation in the habeas corpus petition that the presiding inspector indicated to petitioner that "it was not necessary to have counsel at the hearing and thereby induced [him] to proceed at the hearing \* \* \* without counsel" (*supra*, p. 5). A statement that counsel was not required at the hearing, however, could scarcely have been misunderstood as meaning that counsel was not permitted. And it must be assumed that the inspector fulfilled his duty under the regulations (see fn. 4, p. 5) to apprise petitioner that he had a right to be represented by counsel if he so desired. If there was any intention of asserting in the habeas corpus petition that the inspector fraudulently induced petitioner to waive counsel by bringing undue influence to bear on him, or otherwise, the meaning surely could and should have been less equivocally expressed.

(b) The contention in respect of falsification of the minutes of the hearing evidently has reference to the allegation in the habeas corpus petition that petitioner's remark "yes" to the presiding inspector on being handed a probation officer's report meant merely that he would read the report, not that it was true, as the typewritten minutes of the hearing might be misconstrued to mean (*supra*, p. 5). If, however, as alleged, petitioner's "yes" meant merely that he would read the report and if it was taken from him before he did read it, it is surely not unreasonable to suppose that he would not have remained silent, but would

promptly have explained to the inspector that the latter had misunderstood his meaning. And the minutes of the hearing would have reflected such an explanation, unless the reporter who recorded the proceedings deliberately omitted it, which we do not understand petitioner intended to assert. Consequently, we think it clear that this allegation of the habeas corpus petition was insufficient to warrant the taking of testimony concerning the alleged incident.<sup>11</sup>

(c) The contention in respect of refusal to permit petitioner's counsel to examine "the files" of the Immigration and Naturalization Service evidently has reference to the allegation in the habeas corpus petition that petitioner's present attorney, who apparently was retained about October 24, 1947 (*supra*, p. 3) and certainly after October 13, 1947, when the application for a stay of deportation was denied, was not "given an opportunity of examining the record of the Immigration Service, although demand therefor has been made on October 24, 1947, except that" he did receive the minutes of the hearing of December 5, 1946, the findings of the presiding inspector, and the decision of the Board of Immigration Appeals (*supra*, pp. 5-6). This refusal, it was alleged (cf. R. 9 with Pet. 21), was unjustified in view of the provisions of 8 C.F.R., 1944 Supp., 95.6(b). This section provides that "During the time a case is pending the attorney or representative of record, or his associate, shall be permitted to review the record and, upon request, be lent a copy of the testimony adduced \* \* \*." Under this regulation, counsel was not entitled to

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<sup>11</sup> Petitioner's apparent suggestion that he was entitled to receive, on demand, a copy of the minutes of the hearing (*supra*, p. 5) is without merit. All that he was entitled to receive was a copy of the presiding inspector's memorandum containing his discussion of the evidence, proposed findings of fact and conclusions of law, and proposed order respecting deportation (8 C.F.R., 1943 Cum. Supp., 150.7(d)).

examine the "files" of the Service, but only the record of the deportation proceeding; and by his own admission, counsel did receive the record of the proceedings upon which the deportation warrant was based, i.e., the minutes of the hearing and the decision thereon.

Moreover, on October 24, 1947, on which date, allegedly, counsel was refused permission to examine the files of the immigration service, with the exceptions stated, petitioner's "case"—manifestly a reference to deportation or other administrative proceedings before the Immigration and Naturalization Service—was no longer "pending." Petitioner had had his hearing on December 5, 1946; he had been ordered deported on April 15, 1947; the Board of Immigration Appeals had affirmed the order and the warrant of deportation had been issued on April 18, 1947; and the application for a stay of deportation had been denied on October 13, 1947. There was no allegation in the habeas corpus petition that any steps in the deportation proceedings were taken after the last-mentioned date. Subsequent events pertained to judicial proceedings in habeas corpus. Consequently, the allegation now under consideration did not support an inference of unfairness in the deportation proceedings.<sup>12</sup>

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<sup>12</sup> Petitioner also urges that the judicial review provisions of the Administrative Procedure Act of 1946 (c. 324, 60 Stat. 237) apply to habeas corpus proceedings brought to test the legality of a deportation order (Pet. 14-19). His purpose in making the contention is merely to show that in judicial review of such an order "substantial evidence" and not merely "some evidence" must be found to support the order and that the administrative officials must be shown not to have acted arbitrarily. But since we have shown that the immigration authorities' determination that petitioner failed to establish his good moral character during the preceding five-year period was clearly based on substantial evidence and that they did not act arbitrarily, it is unnecessary to consider in this case to what extent, if at all, the act is applicable to deportation proceedings. Cf. *United States v. Watkins*, 73 F. Supp. 216 (S.D.N.Y.); see *United States ex rel. Trinler v. Carusi*, decided February 16, 1948 (C.C.A. 3).

## CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court and should therefore be denied.

Respectfully submitted,

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MARCH, 1948.

